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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. MICHAEL ALFRED ESTEVEZ, Defendant and Appellant.	H021998 (Santa Clara County Super. Ct. No. C9915661)

A jury found appellant guilty of various violent sex offenses committed against four different victims over a 16 month period of time.

Specifically, with regard to Jane Doe I, Ruby, appellant was found guilty of rape by force (Pen. Code, § 261, subd. (a)(2), count one) and foreign object penetration by force (Pen. Code, § 289, subd. (a)(1), count two), for both counts the jury found true the allegations that appellant had committed an offense specified in Penal Code section 667.61, subdivision (c) against more that one victim and that he personally used a handgun within the meaning of Penal Code section 12022.5, subdivision (a)(1).

With regard to Jane Doe II, Kristin, appellant was found guilty of sodomy by force (Pen. Code, § 286, subd. (c)(2), count three) and two counts of rape by force (Pen. Code, § 261, subd. (a)(2), counts four and five), as to counts three, four and five, the jury found true the allegations that appellant had committed an offense specified in Penal Code section 667.61, subdivision (c) against more that one victim and had kidnapped the

victim in the present case within the meaning of Penal Code section 667.61, subdivisions (a) and (e).

With regard to Jane Doe III, Justina, appellant was found guilty of rape by force (Pen. Code, § 261, subd. (a)(2), count six), the jury found true the allegations that appellant had committed an offense specified in Penal Code section 667.61, subdivision (c) against more than one victim, had kidnapped the victim in the present case within the meaning of Penal Code section 667.61, subdivisions (a) and (e) and had personally used a handgun within the meaning of Penal Code section 12022.3, subdivision (a). Further, appellant was found guilty of robbery in the second degree (Pen. Code, § 211-212.5, subd. (c), count seven).

With regard to Jane Doe IV, Pauline, appellant was found guilty of rape by force (Pen. Code § 261, subd. (a)(2), count eight), the jury found true the allegations that appellant had committed an offense specified in Penal Code section 667.61, subdivision (c) against more than one victim, had kidnapped the victim in the present case within the meaning of Penal Code section 667.61, subdivisions (a) and (e) and had personally used a handgun within the meaning of Penal Code section 12022.3, subdivision (a).

Appellant was sentenced to 100 years to life, plus 37 years composed of the following: four consecutive 25 year to life terms on counts one, three, six, and eight; three consecutive six year midterms on counts two, four, and five; one consecutive three-year midterm on count seven; and four consecutive four-year midterms on the firearm enhancements in counts two, six, seven, and eight. A ten-year midterm on the firearm enhancement in count one was stayed.

Appellant contends that: 1) Penal Code section 667.61, subdivision (e)(5), the "multiple victim enhancement" violates the federal constitutional guarantees of due process and equal protection because the statute penalizes those persons whose various charges happen to be tried together; 2) defense counsel was ineffective for failing to file a severance motion (U.S. Const., 6th Amend.); 3) the prosecution committed prejudicial

misconduct thus denying appellant his right to a fair trial under the United States and California Constitutions; 4) the convictions should be reversed because defense counsel was ineffective for failing to object to the misconduct; 5) under a proportionality review of the sentence a term of 100 years to life plus an additional 37 years violates both state and federal prohibitions against cruel and unusual punishment (U.S. Const., 8th Amend.; Cal. Const., art. I, § 17); 6) the trial court erred when it imposed a full consecutive sentence on count five because that offense did not involve a separate victim or a separate occasion; 7) trial counsel was ineffective for failing to object to the sentence on count five. We find appellant's contentions without merit and affirm.

Since appellant challenges the evidence presented that count five, one of the rapes of Kristin, did not involve a separate victim or separate occasion, and because he challenges his sentence as cruel and unusual punishment, we set forth the facts of each sexual assault to the extent necessary for a determination of the issues on appeal.

Facts

Appellant was convicted of various sex offenses against four different victims. He admitted having sexual relations with each of the four, but maintained that the acts were consensual. He testified that knowing the reputation of the Alameda and Monterey Road for prostitution, he met the women "cruising" for prostitutes whom he normally paid with drugs and cash. These women were "basically" hookers or persons of low morals; they made up their stories out of shame, "probably being instructed by a response team or whomever." They each consented to sex and mistakenly thought that his toy gun was real.

Pauline; count eight; September 20, 1997

Seventeen-year-old Pauline was approached by appellant while waiting at a pay phone. Appellant asked her if she was waiting for a call. She replied that she was. Appellant told her that he wanted to show her something. When she asked what it was he replied "come here. Do you see this?" Appellant then showed her a fanny pack located

on the trunk of his car. In the fanny pack was the gun. Appellant told Pauline that he was a San Jose police officer and he accused her of soliciting. He showed her a wallet with a badge and an identification card. Appellant told Pauline that she was under arrest for solicitation. Pauline testified that the gun bore no resemblance to a toy gun found in appellant's car after his arrest.

Believing that appellant was a police officer, Pauline sat in appellant's car as she was instructed. Appellant began to drive around the neighborhood. He told Pauline that he was looking for his sergeant to determine whether or not she should booked.

Eventually, appellant drove into a parking garage on the Alameda. He backed his car into a particular parking stall next to a brick wall. Appellant got out of the car and opened the passenger door. He made Pauline's seat recline and told her to roll over. Then, he grabbed her left breast and pressed the gun into her back. When she protested about what appellant was about to do he told her to "shut the fuck up" or he would kill her. When Pauline tried to look around, appellant pushed her face into the headrest on the seat. Appellant pulled down Pauline's underwear, pulled down his own pants and vaginally raped her. After the rape was accomplished, appellant pulled up his pants, wiped Pauline's vagina with her skirt, redressed her, and told her to get out of the car. As Pauline walked to the front of the car, appellant gave her five seconds to run. Thinking that he would shoot her she ran screaming from the garage.

A SART examination revealed that Pauline had recent bruises and abrasions. Vaginal swabs were positive for live sperm. Her injuries were consistent with the described sexual assault. Furthermore, a semen stain on her pants and on the vaginal swab had appellant's DNA profile and excluded Pauline's boyfriend with whom she had intercourse earlier on the day of the rape.

Justina; counts six and seven; December 6, 1998

After Justina left the McDonalds where she had been working, she went to cash her paycheck and her daughter's paycheck. Then, she took the bus to the Alameda, where

she got off intending to walk the short distance to her apartment. As she walked by a bank on the Alameda, a man yelled at her to stop. She stopped and saw appellant standing next to a small gray car parked on the sidewalk. He talked on a cell phone while he was holding a flashlight. He told Justina that he was a police officer and wanted to see her identification because she was in a drug area. Justina opened her handbag and handed appellant her identification. Whereupon, appellant looked through her purse and asked why she had so much money in a drug area. Justina told him that it was not drug money and showed him her paycheck stubs. Appellant told Justina that he was going to take her to the police station because of all the money she had on her. Then, he grabbed Justina by her upper arm, told her to get into the car and held a black pistol on her. After she complied, he put a seat belt on her and closed the door. He drove in a circle and told her not to look at him, to keep looking forward.

Appellant drove into the underground parking garage at 1635 The Alameda and parked in the same unlit space in the back of the building behind the wall where he had taken Pauline. Appellant told Justina to stay there. He got out of the car saying that he was going to find another officer. Appellant rummaged in the trunk of the car, then opened the passenger door, grabbed one of Justina's hands, pulled her other hand toward her back and had her turn around saying he was going to handcuff her. He told her that he would go "boom" if she moved. He touched her side with a hard metal object that she thought was a gun. Appellant pulled down Justina's pants, held both her hands behind her back with one of his hands and vaginally raped her. Appellant pulled up his pants and climbed over Justina to the driver's seat. He wiped Justina's vagina with some towels and demanded her money. When she refused he yelled at her saying that he was taking the money to the police station and that it would be returned. No longer believing that he was a police officer, she gave him her money, which she never got back. Appellant started the car. Thinking that he was going to take her somewhere to kill her, Justina opened the car door. Appellant threatened her with the black gun. Justina got out of the

car and ran to the street. She thought that appellant was chasing her; instead he drove past.

A SART examination revealed redness on the right inner labia minora and a red lesion on the posterior fourchette consistent with the described sexual assault and time frame. Furthermore, DNA tests revealed that appellant was the source of the semen on Justina's panties with a sperm cell fraction that occurred once in greater than a trillion individuals.

Ruby; counts one and two; December 27, 1998

Ruby, who spoke little English and cleaned houses for a living, was waiting alone at a bus stop when appellant walked up to her and identified himself as "Manuel." He asked a few friendly questions in Spanish about what she was doing, her destination and name. He offered her a ride, but Ruby was reluctant to go. Only after he insisted and told her that he was a good person did she agree he could give her a ride a few blocks to a stop where she could catch another bus.

Appellant drove his car over to where Ruby was waiting and she got in. When they reached the next bus stop, Ruby asked to get out of the car. However, appellant drove onto the freeway telling Ruby that he was just going to pick up his paycheck and that he would come back. After leaving the freeway, appellant drove into a parking lot adjacent to a building, stopped the car and walked off toward the door of the building.

Ruby got out of the car and started walking because she was scared and no one else was there. Appellant reappeared, told her to get back in the car, everything was fine and they were leaving. Believing him, Ruby complied. At this point appellant yelled that he could do anything with her, whatever he wanted and that he was going to kill her. He put a black pistol to her head. The pistol was similar, but bigger than the toy gun in evidence. She could feel metal.

Appellant pulled down her pants and underpants, turned her around so she faced the back of the car, pulled down his pants and got behind her, and while yelling that he

could do whatever he wanted, put the gun to her side. While she was face down touching the headrest, she pleaded with him, but he yelled he could do anything with her and touched her breasts with his hand. He held the gun to her head as he inserted something into her vagina, then, raped her from behind.

After appellant dressed, he got into the driver's seat and started to drive out of the parking lot. He stopped by a dumpster whereupon Ruby who was only partially dressed, jumped out and ran. She left behind her purse and shoes and fell twice hurting her hand, thumb and foot.

A SART examination conducted that night revealed abrasions on the lower edge of Ruby's vaginal opening, abrasions on her abdomen and above her kneecaps, numerous scratches and bruises, and a broken toe, thumb and wrist. The injuries were consistent with the history that Ruby had given. DNA testing established that appellant contributed semen recovered from a vaginal swab taken from Ruby and a sanitary napkin attached to Ruby's panties.

Kristin; counts three, four and five; January 15, 1999

Kristin was living on the streets when she met appellant. She had been invited to a party at the San Jose Inn on the Alameda. She arrived at the motel at about 11:30 p.m., but could not find the room. When she went out to the parking lot, appellant walked over to her from a tan or beige hatchback and asked her if she was looking for "a long-haired skater chick." The description appeared to be that of Kristin's friend Teresa, who she was supposed to meet. Appellant told Kristin that he had seen this person talking on the pay phone, then walk down the street. Kristin accepted appellant's offer of a ride to catch up with Teresa. He drove out of the parking lot, pushed Kristin's seat to recline it, said that he was going to do what he wanted to her because he had a gun, and drove onto the freeway.

Appellant drove off the freeway and pulled into a parking area at 1436 White Oaks Road and backed into the same stall where Ruby was raped. Appellant climbed over the

center console, got on top of Kristin and took off her shoes and pants. When she started to fight appellant repeated that he had a gun. Two or three times when he reached under his seat and "fooled around" with an object, she heard a clinking metallic sound that she assumed was a gun. When she cried and told him to stop, he told her to shut up and stop crying, it would do her no good. He rolled her over on her stomach, got behind her and pulled down his pants to his ankles. He removed her tampon and threw it out of the window. Kristin was not sure of the sequence, but he raped her twice, once on her stomach and once on her back, and sodomized her once. During one of the rapes he used a condom, but not for the other rape or when he sodomized her. Appellant dropped the condom out of the passenger window after the rape. While she was being sodomized she tried to fight, but he told her not to and leaned on her back with his elbows and pushed her face down into the seat. Appellant got out of the car and allowed Kristin to pull up her pants. Then he got back in the car, told her to stay face down on the seat, drove a short distance before stopping in the street, reached over to open the door and shoved her out onto the street, then threw out her backpack and drove off. Kristin ran to a firehouse across the street and had personnel call the police.

Kristin directed Campbell police to the parking stall where a condom and a tampon were recovered from the ground. DNA tests conducted on semen recovered from rectal swabs in a SART examination revealed appellant as the source. The vaginal swab taken was primarily female DNA consistent with Kristin. Sperm inside the condom was consistent with appellant's sperm. However, some DNA on the outside of the condom was from another unidentified female.

DNA tests conducted on semen recovered from a stain on one of the seat covers removed from appellant's car established appellant as the source. However, the profile in the epithelial cell faction was of yet another unidentified woman.

During the prosecution's case Rosemary was called as a witness. She testified that she had met appellant on December 18, 1997, at a nightclub in San Jose. Appellant

approached Rosemary. They talked about music, then he asked her to step outside to show her something. She was reluctant, but eventually agreed to go. Appellant identified himself as a police officer and said that there was going to be a drug raid; that they had connected her with a drug dealer and had to take her in for questioning. Believing that appellant was an undercover office Rosemary left with him and got into his car. Appellant told her that he was engaged in a prank, apologized and said that he was just infatuated and would take her back after stopping at a friend's house for a few minutes. Eventually, appellant returned Rosemary to the nightclub.

Discussion

I. Equal Protection

Appellant contends that Penal Code section 667.61, subdivision (e)(5) (hereinafter the multiple victim circumstance) "violates the federal constitutional guarantees of due process and equal protection because the statute penalizes those persons whose various charges happen to have been tried together."

Respondent argues that appellant's claim was forfeited by not raising it in the trial court. However, because appellant contends that his counsel was ineffective in failing to file a severance motion we will address appellant's equal protection argument.

Penal Code section 667.61,[1] commonly known as the "One Strike law" (*People v. Rayford* (1994) 9 Cal.4th 1, 8), sets forth an alternative sentencing scheme for certain

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[1] Penal Code section 667.61 provides in pertinent part: "(a) A person who is convicted of an offense specified in subdivision (c) under one or more of the circumstances specified in subdivision (d) or under two or more of the circumstances specified in subdivision (e) shall be punished by imprisonment in the state prison for life and shall not be eligible for parole for 25 years except as provided in subdivision (j)."

Relevant to this case subdivision (c) specifies that this section shall apply to any of the following offenses: "(1) A violation of paragraph (2) of subdivision (a) of Section 261. [Rape, accomplished against a person's will by means of force or violence.] . . . [¶] (5) A violation of subdivision (a) of Section 289. [Sexual penetration by foreign object, accomplished against the victim's will by means of force or violence.] [¶] (6) Sodomy or

specified sex crimes. These include rape, penetration with a foreign object, and sodomy, all by force. This section becomes applicable if the defendant has previously been convicted of one of seven specified offenses or if the current offense was committed under one or more specified circumstances. Subdivision (a) provides that if the defendant is convicted of an offense enumerated in subdivision (c) and if two or more of the circumstances specified in subdivision (e)[2] apply to the current offense, then an indeterminate term of 25 years to life shall be imposed. Subdivision (b)[3] provides that if only one of the circumstances specified in subdivision (e) applies, then an indeterminate term of 15 years to life shall be imposed. The statute requires the element(s) to be pled in the accusatory pleading and either admitted by the defendant or found to be true by the trier of fact. (Pen. Code § 667.61, subd. (i); *People v. Mancebo* (2002) 27 Cal.4th 735, 743.)

Appellant was charged with a number of sexual assaults. The information alleged that he should be sentenced to indeterminate consecutive terms of 25 years to life on each of these assaults, based in part on the allegation that he was "convicted in the present case or cases of committing [a sexual assault] against more than one victim." (Pen. Code, § 667.61, subd. (e)(5).) With respect to each of the charges, one of the circumstances

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oral copulation in violation of Section 286 or 288a by force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person. . . ."

[2] Relevant to this case subdivision (e) enumerates the following circumstances that shall apply to the offenses specified in subdivision (c): "(1) . . . the defendant kidnapped the victim of the present offense . . . . [¶] (4) The defendant personally used a dangerous or deadly weapon or firearm in the commission of the present offense in violation of Section . . . 12022.3, ... [¶] (5) The defendant has been convicted in the present case or cases of committing an offense specified in subdivision (c) against more than one victim."

[3] Subdivision (b) states in pertinent part: "[A] person who is convicted of an offense specified in subdivision (c) under one of the circumstances specified in subdivision (e) shall be punished by imprisonment in the state prison for life and shall not be eligible for release on parole for 15 years . . . ."

alleged was the multiple victim circumstance; the other circumstances alleged were that appellant used a firearm (Pen Code § 667.61, subd. (e)(4)) and/or that he kidnapped the victim (Pen Code § 667.61, subd. (e)(1)). With respect to two of the victims, Pauline and Justina, the jury found all three circumstances. However, with respect to the other two victims, Ruby and Kristin, the jury found only one circumstance aside from the multiple victim circumstance. Therefore, appellant argues that if his cases had been tried separately and he had "been convicted after four separate trials, the multiple victim circumstance could not have been imposed because he would not have been convicted in 'the present case or cases.' "

Appellant argues that the multiple victim circumstance discriminates against that class of defendants who happened to have all their sexual assault charges tried at the same time. Conversely, the statute favors those defendants charged with sexual assaults against more than one person, when either by prosecutorial choice or by the defendant's successful motion to have cases tried separately, those charges are tried separately.

"The right to equal protection of the laws is guaranteed by the Fourteenth Amendment to the federal Constitution and article I, section 7 of the California Constitution. The 'first prerequisite' to an equal protection claim is ' "a showing that 'the state has adopted a classification that affects two or more similarly situated groups in an unequal manner.' ". . . ' [Citation.] [¶] 'Equal protection applies to ensure that persons *similarly situated* with respect to the legitimate purpose of the law receive like treatment; equal protection does not require identical treatment. [Citation.]' [Citation.]" (*People v. Hubbart* (2001) 88 Cal.App.4th 1202, 1216-1217, italics added.)

Essentially, appellant argues that section (e)(5) as written requires joinder of cases before the multiple victim circumstance can apply. Quoting *People v. DeSimone* (1998) 62 Cal.App.4th 693, respondent argues "the statutory phrase 'has been convicted in the present case or cases' (§ 667.61, subd. (e)(5)) on its face, means '*any* conviction of a qualifying sexual offense when the defendant *stands currently convicted* of a least one

other such offense against a different victim.' " Respondent interprets this to mean that the statute does not specify procedural limitations on the "present case or cases," rather, a conviction is in the present case or cases when it is not a prior conviction. Appellant counters that if cases are not joined for trial, "any conviction with respect to *another* victim must necessarily be a 'prior' conviction."

We are not persuaded that subdivision (e)(5) as written requires that cases must be joined for trial for the multiple victim circumstance to apply. Appellant's assertion that if one case followed the other, a conviction in the first one would be a prior conviction and thus would not be "in the present case or cases" is mistaken. "Prior conviction" is a term of art that has been judicially construed to mean a conviction that occurs before the commission of the offense for which the defendant is now being prosecuted. (*People v. Rojas* (1988) 206 Cal.App.3d 795, 798.)[4] Thus as applied in this case, even if appellant had been tried in four separate cases none of his convictions would be prior convictions for sentencing purposes. As they are not prior convictions they must necessarily be current or present convictions. Thus, even if appellant's cases had been tried separately,

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[4] In *People v. Rojas, supra,* 206 Cal.App.3d 795, 798 (*Rojas*), the Second District Court of Appeal held that to be subject to a five-year enhancement of prison term pursuant to Penal Code section 667, subdivision (a), a defendant's prior serious felony conviction must have occurred before the commission of the present offense. In reaching this conclusion the court noted that Penal Code section 969, in charging the fact of a previous conviction of felony, states that it is " 'sufficient to state, "That the defendant, *before the commission of the offense charged herein*, was in (giving the title of the court in which the conviction was had) convicted of a felony. . . ." ' " (*Id*. at p. 800, italics added.) We note, as did the *Rojas* court, that Penal Code section 969 still reads as it has since 1951. (*Ibid.*) Similarly, under Penal Code section 667.61 a prior conviction exists where "[t]he defendant has been previously convicted of an offense specified in subdivision (c), including an offense committed in another jurisdiction that includes all of the elements of an offense specified in subdivision (c)." (Pen. Code § 667.61, subd. (d)(1).) A convicted sex offender who repeats that conduct receives a 25-year to life sentence, whereas a finding that the defendant in the present case or cases committed an offense against multiple victims brings a 15-year to life sentence. (Pen. Code § 667.61, subd. (b).)

the multiple victim circumstance could have been pled and proved and appellant would have been convicted in the "present case or *cases* of committing [a specified sexual assault] against more than one victim." (Pen. Code, § 667.61, subd. (e)(5), italics added.)

Appellant has not shown that the statute penalizes those persons whose various charges happened to have been tried together. Therefore we reject his equal protection challenge to Penal Code section 667.61, subdivision (e)(5).

Since we have rejected appellant's contention that Penal Code section 667.61, subdivision (e)(5) requires joinder to apply, we reject appellant's argument that he was denied the effective assistance of counsel by his lawyer's failure to move to sever the various charges.

II. Prosecutorial Misconduct

Appellant contends that the prosecution committed prosecutorial misconduct, thus denying appellant of his right to a fair trial under the United States and California Constitutions.

Respondent argues that appellant's failure to object to the prosecutor's comments waives the issue on appeal. We agree. However, because appellant contends that he was denied the effective assistance of counsel by his lawyer's failure to object to the prosecutor's comments, we will address appellant's claims of prosecutorial misconduct.

Appellant argues that the following comments or statements by the prosecutor amount to prosecutorial misconduct: In his opening statement the prosecutor said the evidence would show Estevez was "a serial rapist," "a sexual predator"; who "sexually assaulted at gunpoint at least four women that we know of"; and "had a whole method of operation, modus operandi if you will, of what he liked and how he could satisfy his sexual perversion" with "two primary hunting grounds during this time period."

During cross examination of appellant, after appellant responded to a question by asking what the prosecutor would like him to answer, the prosecutor responded, "Well, I would like the truth but I don't know what I'm going to get instead."

In closing argument the prosecutor remarked that based on the similarity of appellant's offer to show something to both Pauline and Rosemary he hoped that the latter's "words struck you as they did me when I sat there listening to her testimony"; said the evidence showed "the face of evil" and that certain people are not disturbed or sick "just evil"; said such people "enjoy hurting people, they enjoy torturing women and when we see it up close like we have in this case it's truly shocking and appalling and startling"; asked the jury "to be brave and to stand here with me and look right into the face of evil" and "look into that face, the face of evil, the face without remorse, without flinching, and tell him, you did this, we know you did it, you are guilty and you must be punished"; remarked that appellant "couldn't even act. He can't even act innocent as he sits over there. He can't even act innocent when he gets on he stand. He can't even act sorry. It's not in his nature. He could not do it"; characterized appellant as not only a "serial rapist but a serial liar" and a "horrible liar"; referred to "when he slithered up there" to testify; characterized appellant's testimony as a "complete lie" and a "fairy tale"; and in rebuttal said that appellant's explanation for the motive of the victims to lie was "venom and . . . bile that spewed forth."

Misconduct occurs when the prosecutor uses methods that are deceptive or reprehensible to attempt to persuade either the court or the jury. (*People v. Earp* (1999) 20 Cal.4th 826, 858.)

Appellant argues that the prosecution's closing argument was replete with inflammatory and derogatory references: "Rather than coolly and rationally arguing what he believed the evidence showed, the assistant district attorney engaged in name-calling. It wasn't good enough to say that the evidence showed that appellant committed a number of sexual assaults. Instead, the prosecution chose to use far more colorful language. Appellant was a 'sexual perv[ert]', a ' serial rapist' and a 'sexual predator' who 'stalked' and 'hunted' vulnerable women who dared enter his 'hunting grounds.' Further, the prosecution repeatedly referred to how 'evil' appellant was. Appellant was a 'serial liar'

and a 'horrible liar' who should not be believed. Appellant 'slithered' to the stand. His testimony was nothing but 'venom and bile.' "

The totality of the prosecutor's remarks establishes that he was taking advantage of the right to "argue vigorously and include opprobrious epithets and forceful language when warranted by the evidence. [Citations.]" (*People v. Herring* (1993) 20 Cal.App.4th 1066, 1074.) References to appellant as a "sexual predator," a "sexual perv[ert]" and a "serial rapist" were fully supported by the evidence of four young women who were lured into appellant's car by deception, where they were forcibly raped by appellant, and in one case sodomized as well. Furthermore, characterizing appellant as "the face of evil," "just evil" and someone who "enjoy[ed] hurting people, enjoy[ed] torturing women," were fair comments on the evidence. As to the comment that appellant "slithered," it is not misconduct to characterize the defendant in such terms when warranted. (*People v. Edelbacher* (1989) 47 Cal.3d 983, 1030.)

Moreover, the prosecutor's comments on appellant's demeanor while testifying and his comments that appellant was a "horrible liar" and a "serial liar" do not amount to misconduct. "Comment on a defendant's demeanor as a witness is clearly proper . . . ." (*People v. Edelbacher*, *supra*, 47 Cal.3d at p. 1030) and comments that refer to the testimony of "a defendant as 'lies' is an acceptable practice so long as the prosecutor argues inferences based on evidence rather than the prosecutor's personal belief resulting from personal experience or from evidence outside the record. [Citations.]" (*Ibid.*) The prosecutor's comments were based on evidence that showed that each of the victims were sure that the appellant had a real gun, not a toy gun, and the sex was not consensual, as appellant claimed. These comments amounted to no more than vigorous but fair argument.

Next, appellant argues that by telling the jury that it should believe Rosemary and Pauline because of the coincidences in their stories, and because the prosecution found the similarity so striking, the prosecutor engaged in improper vouching.

The prosecutor has wide latitude to argue from reasonable deductions and inferences based on the evidence to bolster a witness's credibility. (*People v. Gates* (1987) 43 Cal.3d 1168, 1188.) However, a prosecutor "may not express a personal opinion or belief in a witness's credibility when there is ' "substantial danger that jurors will interpret this as being based on information at the prosecutor's command, other than evidence adduced at trial." ' " (*People v. Fauber* (1992) 2 Cal.4th 792, 822.) "Prosecutorial assurances, *based on the record*, regarding the apparent honesty or reliability of prosecution witnesses, cannot be characterized as improper 'vouching,' which usually involves an attempt to bolster a witness by reference to facts *outsid*e the record." (*People v. Medina* (1995) 11 Cal.4th 694, 757.)

None of the prosecutor's remarks refer to anything regarding Rosemary's credibility that was not presented to the jury. No reference was made either directly or indirectly to evidence outside the record. Rather, the prosecutor simply drew inferences as to the credibility of both Rosemary and Pauline on the basis on the evidence presented to the jury. Pauline testified that shortly after appellant approached her he told her that he wanted to show her something. Rosemary's testimony regarding what appellant said when he approached her was identical. All the prosecutor did was to express how striking were the similarities in their testimony.

Respondent argues that as to the prosecutor's comments during opening statements, the prosecutor was entitled to advise the jury that the evidence would show that appellant was a sexual predator and a serial rapist with two particular areas where he inflicted sexual assaults following a similar modus operandi. We agree. "The function of an opening statement is not only to inform the jury of the expected evidence, but to prepare the jurors to follow the evidence and more readily discern its materiality, force, and meaning. [Citation.]" (*People v. Dennis* (1998) 17 Cal.4th 468, 518.)

Appellant argues that by telling the jury that appellant sexually assaulted four women "that we know of," he "strongly implied that appellant 'got away' with other

unreported and uncharged sexual assaults" and "implies that the prosecution has some secret knowledge that is being kept from the jury." We are not persuaded that the prosecutor's remark was anything more than a reference to the evidence that was presented that at least one other women whose DNA was found on a condom, and one whose DNA was found on the seat cover removed from appellant's car, were unknown.

Since we have demonstrated above that the prosecutor's comments did not amount to prosecutorial misconduct, there was no prejudice to defendant in defense counsel's failure to object.

III. Cruel and Unusual Punishment

Appellant contends that under a proportionality review of the sentence a term of 100 years to life plus an additional 37 years violates both the state and federal prohibitions against cruel and unusual punishment. (U.S. Const., 8th Amend.; Cal. Const., art. I, § 17.)[5]

Appellant argues that the imposition of the enhancement constitutes cruel and unusual punishment under *People v. Dillon* (1983) 34 Cal.3d 441 478 (*Dillon)*, because it is "disproportionate to the seriousness of the underlying crimes."

Respondent contends that defendant waived this issue by failing to raise it in the trial court. "Since the determination of the applicability of *Dillon* in a particular case is fact specific, the issue must be raised in the trial court. Here, the matter was not raised below, and is therefore waived on appeal. [Citation.]" (*People v. DeJesus* (1995) 38 Cal.App.4th 1, 27.) However, as did the *DeJesus* court, we will consider the issue on

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[5] The federal Constitution proscribes "cruel and unusual punishment," while the state Constitution proscribes "cruel or unusual punishment." (*People v. Anderson* (1972) 6 Cal.3d 628, 641.) "[P]unishments of excessive severity for ordinary offenses" may be both cruel and unusual within the meaning of the state Constitution. (*Id*. at p. 646.)

appeal "in order to 'forestall a subsequent claim of ineffectiveness of counsel.' " (*Ibid*., quoting *People v. Martin* (1995) 32 Cal.App.4th 656, 661.)[6]

Since the California Constitution's prohibition against cruel or unusual punishment is arguably broader than the United States Constitution's prohibition against cruel and unusual punishment, we analyze appellant's contention under the California standard only. A punishment that satisfies this standard necessarily also satisfies the federal standard. (Cf. *People v. Anderson*, *supra*, 6 Cal.3d 628.)

A defendant bears the burden of establishing that the punishment prescribed for his offense is unconstitutional. (*People v. King* (1993) 16 Cal.App.4th 567, 572.)

Relying solely on a concurring opinion by Justice Mosk in *People v. Deloza* (1998) 18 Cal.4th 585, appellant argues a sentence that cannot be served within the lifetime of the prisoner constitutes cruel and unusual punishment. In the concurring opinion, which Justice Mosk conceded was unnecessary to the resolution of the *Deloza* case, Justice Mosk concluded "[a] sentence of 111 years in prison is impossible for a human being to serve, and therefore violates both the cruel and unusual punishments clause of the Eighth Amendment to the United States Constitution and the cruel or unusual punishment clause of article I, section 17 of the California Constitution." (*People v. Deloza*, *supra*, 18 Cal.4th at pp. 600-601.) We are not persuaded by defendant's argument and conclude under the following well-recognized tests that defendant's sentence is not unconstitutional.

The California Supreme Court has "identified three techniques used by the courts to focus the inquiry: (1) an examination of 'the nature of the offense and/or the offender,

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[6] We note the irony in saying that a determination of the applicability of *Dillon* in a particular case is fact specific such that the issue must be raised in the trial court, but then decide to review the record to determine whether appellant's sentence constitutes cruel or unusual punishment. In this case the record is detailed and extensive such that we are able to conduct a proportionality review on appeal.

with particular regard to the degree of danger both present to society'; (2) a comparison of the challenged penalty with those imposed in the same jurisdiction for more serious crimes; and (3) a comparison of the challenged penalty with those imposed for the same offense in different jurisdictions." (*In re Reed* (1983) 33 Cal.3d 914, 923, quoting *In re Lynch* (1972) 8 Cal.3d 410, 425-429.)

"[E]ven if factors 2 and 3 of the *Lynch* test favor a finding of disproportionality, we must examine the nature of the offense and the offender and set aside the [penalty] only if it is 'so "disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity." [Citation.]' [Citation.]" (*People v. King, supra*, 16 Cal.App.4th at p. 574.)

As to the first factor, courts must consider the "totality of the circumstances" surrounding the commission of the crime, including "such factors as its motive, the way it was committed, the extent of the defendant's involvement, and the consequences of his acts." (*People v. Dillon, supra*, 34 Cal.3d at p. 479.)

When we consider the nature of the offenses and the offender in this case, we conclude that defendant's sentence neither shocks the conscience nor is disproportionate to the crimes. Appellant forcibly raped four young women. He used a gun to threaten to kill all the victims, kidnapped three of them, and robbed Justina. Appellant's crimes reflect planning and calculation. He obtained a police badge, selected particular parking places from where he could observe his surroundings but not be seen, and had obviously been watching the San Jose Inn on The Alameda because he was able to describe Kristin's friend to her. By impersonating an undercover police officer appellant took advantage of a position of trust. He displayed bouts of pathological anger when he screamed at some of his victims about the power he had over them. Each victim was terrorized during the sex assault. Finally, appellant showed no remorse for his crimes. Rather, he accused each victim of being a prostitute and tried to explain the evidence by

saying that all four victims had made up the story of a sexual assault out of shame, or because they were instructed so to do by a response team.

We conclude that on this record the imposition of the four consecutive 25-years-to-life prison terms plus an additional 37 years does not " 'shock the conscience' " of this court. (*In re Lynch*, *supra*, 8 Cal.3d at p. 424.)

IV. The Full Term Consecutive Sentences on Counts Four and Five

With respect to the sexual assault on Kristin, the jury found appellant guilty in count three of sodomy by force and in counts four and five of two rapes. The trial court used the sodomy conviction in count three to impose a 25 years to life sentence under the "One Strike law." (Pen. Code, § 667.61.) On the remaining rape convictions the court imposed two full consecutive terms of six years each under Penal Code section 667.6. Appellant argues that the court erred by making count five a consecutive full term, because counts four and five were part of the same incident and involved the same victim.

Penal Code section 667.6, subdivision (d) states in pertinent part: "A full, separate, and consecutive term shall be served for each [specified sex offense] . . . if the crimes involve separate victims or involve the same victim on separate occasions. [¶] In determining whether crimes against a single victim were committed on separate occasions under this subdivision, the court shall consider whether, between the commission of one sex crime and another, the defendant had a reasonable opportunity to reflect upon his or her actions and nevertheless resumed sexually assaultive behavior. Neither the duration of time between crimes, nor whether or not the defendant lost or abandoned his or her opportunity to attack, shall be, in and of itself, determinative on the issue of whether the crimes in question occurred on separate occasions. [¶] The term shall be served consecutively to any other term of imprisonment and shall commence from the time the person otherwise would have been released from imprisonment. The term shall not be included in any determination pursuant to Section 1170.1."

Essentially, consecutive terms are required under Penal Code section 667.6, subdivision (d) if the defendant had a reasonable opportunity for reflection between the offenses. (*People v. Corona* (1988) 206 Cal.App.3d 13, 17.) A trial court finding that the offenses occurred on separate occasions must be upheld "unless no reasonable trier of fact could have so concluded." (*People v. Plaza* (1995) 41 Cal.App.4th 377, 385.)

Appellant argues the evidence showed "that these two rapes [of Kristin] were part of one incident." We do not agree. There was clear evidence Kristin told appellant to stop; that he rolled her over to get behind her; that he used a condom for one act of rape and not for the other; that he raped her twice, once while she was on her back and once while she was on her stomach. While the intervening periods between the three sex acts may have been brief, a reasonable trier of fact could have concluded that the fact that defendant used this time to either put on or take off a condom[7] indicated that defendant had "a reasonable opportunity to reflect" on his actions before he raped the victim a second time. Therefore, the evidence supports the trial court's imposition of full consecutive terms under Penal Code section 667.6, subdivision (d) on counts four and five.

Since we have found that there was clear evidence to support the trial court's imposition of the full consecutive term on counts four and five we do not need to address appellant's claim that he was denied the effective assistance of counsel because his attorney failed to object to the sentence on count five.

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[7] Kristin was unclear on the sequence of the sex acts, however, she was certain that during one rape appellant used a condom, but did not use one during the other rape or when he sodomized her. Depending on the sequence of the three acts appellant would either have put on the condom before he raped Kristin the first time and taken it off before he raped her a second time and sodomized her, or he would have raped and sodomized her and then put on the condom before he raped her a second time. Either way he had time to reflect on his actions.

Disposition

The judgment is affirmed.

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Elia, J.

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Premo, Acting P. J.

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Rushing, J.